

KALA DEVI THAMODERAM

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v.

EON FINANCE BHD

HIGH COURT MALAYA, SHAH ALAM

b

LOW HOP BING J

[CIVIL APPEAL NO: MT3-12-114-98]

12 MAY 1999

CIVIL PROCEDURE: Affidavits - Affidavit in appeal record - Whether signed by Commissioner for Oaths - Seal, name, address & number of Commissioner of Oaths together with word “sgd” affixed on affidavit - Whether the making of a mark within meaning of “sign” under s. 3 Interpretation Acts 1948 & 1967

c

CIVIL PROCEDURE: Summary judgment - Affidavit - Affidavit referred to and relied upon by trial judge - Whether defective as affidavit did not have signature of Commissioner for Oaths - Whether summary judgment rightly granted

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WORDS AND PHRASES: “sign” - Interpretation Acts 1948 & 1967, s. 3 - Whether includes the making of a mark

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This was the appellant’s appeal against the decision of the Sessions judge who gave summary judgment for the respondent. The appellant claimed that the respondent’s affidavit in support of the application for summary judgment was defective as it had not been signed by the Commissioner of Oaths. This was because the copy of the said affidavit which was filed in the appeal record did not have the signature of the Commissioner for Oaths. However, the appellant conceded that the affidavit which was filed in the Sessions Court upon which the Sessions judge placed reliance upon was signed manually by the Commissioner for Oaths.

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Held:

[1] Upon perusal of the original affidavit in support of the respondent’s application for summary judgment filed in the Sessions Court, it was found that the said affidavit had indeed been signed by the Commissioner for Oaths. As such, the Sessions judge did not err either in law or in fact when he gave summary judgment for the respondent as he had relied upon the said affidavit which was filed pursuant to O. 25 r. 30(1) of the Subordinate Courts Rules 1980. The respondent had meticulously complied with the rules of court governing an application for summary judgment. Thus, the contention of the appellant could not be sustained.

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- a* [2] By including the said affidavit in the appeal record, the appellant must have been satisfied that it was a valid affidavit. If she was not so satisfied, then she should have done a file search in the Sessions Court from which a file copy of the affidavit could be obtained. That affidavit which had the same allegation of facts as the affidavit in the appeal
- b* record, had indeed been manually signed by the Commissioner of Oaths. To raise the objection now was too late in the day and was completely without merits.

- c* [3] By virtue of s. 3 of the Interpretation Acts 1948 & 1967, the word “sign” includes the making of a mark or the affixing of a thumb print and Stroud’s Judiciary Dictionary defines signature as including a mark to represent one’s name.

- d* [3a] In the impugned affidavit, the Commissioner of Oaths had affixed the seal below the jurat and also under the words “Before me”, his name, address together with the number W-217 and the word “sgd”. All those constituted more than a mark and so affirmatively came within the meaning of the word “sign” in s. 3 of the Interpretation Acts 1948 & 1967. Thus, the affidavit was signed by the Commissioner for Oaths before whom it was sworn.

- e* [Appeal dismissed.]

Case(s) referred to:

Heller Factoring Sdn Bhd v. Zeenex (M) Sdn Bhd & Ors, High Court KL Appeal

No. R2-12-336-95 (*refd*)

Hindustan Construction Co Ltd v. Union Of India [1967] AIR 526 (*refd*)

- f* *Ipmuda Trading Sdn Bhd v. Khoo Kiat Pau t/a Ying’s Trading Co & Anor* [1997] 1 CLJ Supp 158 (*refd*)

R v. Governor Of Pentonville Prison, ex p Passingam And Another [1982] 3 All ER 1012 (*refd*)

Legislation referred to:

- g* Commissioners for Oaths Rules 1993, O. 25 rr. 22(7), 30(1), O. 26A rr. 1, 2, (1), r. 20

Interpretation Acts 1948 & 1967, s. 3

Subordinate Court Rules 1980, O. 25 r. 22(7), O. 26A

Other source(s) referred to:

- h* Stroud’s Judiciary Dictionary, 1974

For the appellant - Thomas Ong; M/s Abdullah A Rahman & Co

For the respondent - Jonson Chong; M/s Karpal Singh & Co

Reported by Usha Thiagarajah

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JUDGMENT**Low Hop Bing J:*****Background***

On 24 December 1997, the plaintiff commenced an action by way of summons in the Sessions Court Klang.

The defendant purported to file a notice of appearance but there was no reference whatsoever to the case no. in question. There was no address for service and it was not even dated. There was no indication as to which court the notice of appearance was filed, nor was it stated to be filed by whom, although it was addressed to “the plaintiff or the plaintiff’s solicitors”. It must be immediately observed that the said notice of appearance was less than a rudimentary copy and the party purporting to file it was quite contented to leave it in a state of limbo or neglect. In this state of affairs, learned counsel for the defendant-appellant, in answer to my question, has candidly replied that the said notice of appearance was not valid. It was also admitted that no defence has ever been filed by the defendant-appellant.

On 13 February 1998, the plaintiff applied to the said Sessions Court for summary judgment under O. 26A of the Subordinate Courts Rules 1980. This application was supported by an affidavit affirmed for and on behalf of the plaintiff on 13 February 1998. The defendant did not file any affidavit in reply. The said application by the plaintiff was heard on 15 May 1998 and the learned Sessions Court judge naturally gave summary judgment with costs in favour of the plaintiff. The defendant has now appealed against that decision.

Sole Ground Of Appeal

Before me, the defendant-appellant raised only one ground of appeal *ie*, that the plaintiff’s affidavit in support of the application for summary judgment is defective in that it has not been signed by the Commissioner for Oaths. Learned counsel for the defendant-appellant had advanced the argument that it is essential for the Commissioner for Oaths to sign the said affidavit. He relied on O. 25 r. 22(7) of the Subordinate Courts Rules 1980 and r. 20 of the Commissioners for Oaths Rules 1993. He added that it is essential for the Commissioner for Oaths to sign manually. He however conceded that the affidavit which was filed in the Sessions Court Klang and upon which the learned Sessions Court judge had placed reliance, had indeed been signed manually by the Commissioner for Oaths. Since the affidavit in the appeal record in this appeal has not been signed manually by the Commissioner for Oaths, this affidavit according to learned counsel for the defendant-appellant

a has been invalidated. He also contended that the affidavit which was served on him as solicitor for the defendant-appellant is also defective in that it was not manually signed.

b In response, learned counsel for the plaintiff-respondent submitted that the affidavit in the appeal record and that served on the defendant's solicitor were valid affidavits. He added that a mark can constitute a signature. In any event, since the affidavit filed in the Sessions Court has been manually signed by the Commissioner for Oaths, and the court below has considered that affidavit, there is nothing wrong in the summary judgment granted to the plaintiff-respondent.

c I have the occasion to peruse the original affidavit actually filed in the Sessions Court Klang and also the appeal record in this appeal and the submissions of the respective learned counsel. The impugned affidavit in support of the plaintiff's application in the Sessions Court Klang has indeed been signed by the Commissioner for Oaths manually. That being the case, the question which arises for determination is whether the affidavit referred to and relied upon by the learned Sessions Court judge was defective as alleged by the said counsel. Since the learned Sessions Court judge has relied on the affidavit which has been signed manually, by the Commissioner for Oaths and this has been filed in court pursuant to O. 25 r. 30(1), there is no doubt in my mind that he has not erred either in law or in fact, when he gave summary judgment for the plaintiff-respondent. The application before the learned Sessions Court judge was made under O. 26A r. 1(1) in Form 65 and was supported by an affidavit in Form 75A, as provided for in O. 26A r. 2(1) of the Subordinate Courts Rules 1980. The plaintiff has meticulously complied with the rules of court governing an application for summary judgment. In the circumstances, the contention of the learned counsel for the defendant-appellant cannot be sustained. This would have disposed of this appeal without further ado. However, in deference to the learned counsel for the defendant-appellant, I went on to consider the rest of his submission.

g The appeal record has been filed by learned counsel for the defendant-appellant and included by the said learned counsel is a copy of the affidavit affirmed on 13 February 1998, in support of the plaintiff's application for summary judgment. The said affidavit has been manually signed by the deponent. The Commissioner for Oaths has completed the jurat portion thereof and also affixed at the words "before me" his name, address, thereon, together with the number W-217 and the word "sgd". O. 25 r. 22(7) provides as follows:

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Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

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The only dispute raised by the defendant-appellant is that the said affidavit has not been “signed” by the Commissioner for Oaths i.e. the person before whom it was sworn. a

Rule 20 of the Commissioner for Oaths Rules 1993 reads as follows:

No oath shall be deemed to have been duly administered unless the Commissioner’s seal has been affixed to it, and the Commissioner has signed, the document, deed or instrument in respect of which the oath was administered. b

By including the said affidavit in the appeal record, learned counsel for the defendant-appellant must have been satisfied that it is a valid affidavit. If he is not so satisfied, then he should have done a file search in the Sessions Court Klang from where a file copy of the affidavit may be obtained. That affidavit which has the same allegations of facts as the affidavit in the appeal record here, has indeed been manually signed by the Commissioner for Oaths. To raise the objection now is too late in the day and is completely without merits. c
Had he filed the affidavit which could have been obtained from the court file, he would know that the affidavit has been signed by the Commissioner for Oaths. Can he now raise the objection by reason his inaction, omission, non-inclusion or neglect? The answer is clearly and logically in the negative. d

The question which then follows is what does the word “sign” mean. The answer is to be found in s. 3 of the Interpretation Act 1967 which reads as follows: e

‘sign’ includes the making of a mark or the affixing of a thumb print.

Stroud’s Judiciary Dictionary 1974 defines a signature as including a mark to represent one’s name. f

In the impugned affidavit, the seal was affixed below the jurat and under the words “Before me”, with the title name, the address and Commissioner for Oaths’s number together with the word “sgd” affixed thereon. All these certainly constituted more than a mark and so in my view affirmatively comes within the mean of the word “sign” in s. 3 of the Interpretation Act 1967. In other words, the affidavit has been “signed” by the Commissioner for Oaths before whom it is sworn. Section 3 provides for an extensive and not an inhibitive definition of the word “sign”. g
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In *Heller Factoring Sdn Bhd v. Zeenex (M) Sdn Bhd & Ors*, High Court KL Appeal No. R2-12-336-95, No. 252 Mallal’s Digest Vol 2(1) Civil Procedure, Nik Hashim JC (now J) rejected the affidavit in reply which was not signed by the deponent. Similarly, in *Ipmuda Trading Sdn Bhd v. Khoo Kiat Pau* i

- a* *t/a Ying's Trading Co & Anor* [1997]1 CLJ Supp 158; [1996] 5 MLJ 637 Augustine Paul JC (now J) excluded an affidavit which has not been affirmed before a Commissioner for Oaths.

- b* The facts before me are different from the facts in the aforesaid two cases, in that the file copy of the affidavit which was relied upon by the learned sessions court judge has been signed by the Commissioner for Oaths. It is also my view that the affidavit in the appeal record has been signed by the Commissioner for Oaths too.

- c* Defendant-appellant's learned counsel has relied on the other cases viz *Hindustan Construction Co Ltd v. Union Of India* [1967] AIR 526, SC and *R v. Governor Of Pentonville Prison, ex p Passingam And Another* [1982] 3 All ER 1012, QBD. After a careful study of these two cases, I find that they did not touch on the interpretation of an equivalent or corresponding provision relating to the definition of the word "sign" as contained in s. 3 of our Interpretation Act 1967. That being the case, though relied upon by the
- d* defendant-appellant, those two cases are not of any assistance to him.

Conclusion

- e* On the foregoing grounds I hold that the decision of the learned sessions court judge is correct and is hereby affirmed, with the result that this appeal is dismissed with costs.

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